

CITATION: Mattina v. Virtus Capital Management Inc., 2023 ONSC 7061
COURT FILE NO.: CV-21-00673296-00CP
DATE: 20231214

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DOMENIC MATTINA)
Plaintiff) *Jeff Rosekat for the Plaintiff*
)
- and -)
)
VIRTUS CAPITAL MANAGEMENT INC.,)
NICOLA SIMONE, MARTIN SIMONE, JOE) *Angus T. McKinnon for the Defendant,*
TROZZA, COLLEEN ADAMS, PROGRESSIVE) *Blaney McMurtry LLP*
DEVELOPMENT FUND TRUST, 2558627)
ONTARIO INC., COMPUTERSHARE TRUST) *Andrew Lundy, Eric S. Baum and Eni Eski, for*
COMPANY OF CANADA, BLANEY) *the Defendants Progressive Development*
MCMURTRY LLP, GEORGE STREET) *Fund Trust, 2558627 Ontario Inc., 2541672*
(BROOKLIN) LIMITED PARTNERSHIP,) *Ontario Inc., and George Street (Brooklin)*
2541672 ONTARIO INC., MICARI) *Limited Partnership*
CONSULTING INC., ROSEWATER BALDWIN)
STREET HOLDINGS LIMITED, RICHARD) *Emilio Bisceglia for the Defendants Nicola*
FAVA, ROSEWATER CAPITAL GROUP) *Simone, Colleen Adams, Martin Simone, and*
LIMITED, ROSEWATER DEVELOPMENTS) *Micari Consulting Inc.*
LIMITED, STOCKWORTH DEVELOPMENTS)
INC., ROSEWATER BALDWIN INC.,)
STOCKWORTH HOMES INC., MARIO)
BOTTERO, MARCO LORENTI, MARCELO)
PEREZ, TREVOR RABIE, ABRAHAM RABIE,)
STEVE THOMPSON, JOHN ALAN LENNOX,)
2336495 ONTARIO INC., 8522146 CANADA INC.,)
CVA REALTY HOLDINGS LIMITED, 1708567)
ONTARIO INC., STOCKWORTH ROSEWATER)
GEORGE STREET LIMITED, ROBERT CAREY)
and THOMAS, EFRAIM LLP)

Defendants)

HEARD: In writing)

Proceeding under the *Class Proceedings Act, 1992*)
)
)

PERELL, J.

REASONS FOR DECISION - COSTS

[1] In this proposed class action pursuant to the *Class Proceedings Act, 1992*,¹ Domenic Mattina seeks to represent a class of persons who invested in what turned out to be a failed development project to build a condominium in Whitby, Ontario.

[2] Amongst the defendants is Blaney McMurtry LLP, the law firm that prepared some of the investment instruments, including an Offering Memorandum. While Mr. Mattina's Certification Motion is pending for next year, Blaney McMurtry LLP brought a motion for a declaration that any lawyer-client privilege it may have had with any of the co-Defendants has been waived. The motion was opposed by the Progressive Development Fund Trust, 2558627 Ontario Inc., 2541672 Ontario Inc., George Street (Brooklin) Limited Partnership, Nicola (Nick) Simone, and Colleen Adams. I granted Blaney McMurtry LLP's motion.²

[3] Blaney McMurtry LLP seeks its costs of \$21,003.76 inclusive of disbursements and applicable taxes on a partial indemnity basis fixed payable by the parties that opposed the motion. It offered to settle costs at \$15,000 to be split equally between the two groups of defendants. The Defendants made a counter settlement offer of \$10,000 again to be split equally between the two groups.

[4] The defendants Nicola Simone, Colleen Adams, and Micari Consulting Inc. submitted that this was an appropriate case in which no costs should be awarded. Alternatively, these defendants submitted that (a) costs should be left to be dealt with as party of the certification motion, or (b) there should be an award of costs of no more than \$2,500 as against them. They also submitted that the costs claimed were excessive for a motion in writing in which there were no cross-examinations.

[5] The defendants Nicola Simone, Colleen Adams, and Micari Consulting Inc. relied on ss. [31 \(1\)](#) of the *Class Proceedings Act*, which provides that in exercising discretion with respect to costs, the court may consider whether the proceeding was a test case, raised a novel point of law or involved a matter of public interest.³

[6] These defendants submitted that it was understandable that they would oppose Blaney McMurtry LLP's motion because in the novel circumstances, they did not have complete access to the documentation over which Blaney McMurtry LLP presumably sought a waiver of privilege.

[7] The defendants Progressive Development Fund Trust, 2558627 Ontario Inc., 2541672 Ontario Inc., and George Street (Brooklin) Limited Partnership submitted that this was an appropriate case to make no order as to costs. These defendants' submissions were similar to those of their co-defendants. Alternatively, these defendants submitted that costs against them be capped at no more than \$5,000.00, all-inclusive. They also submitted that Blaney McMurtry LLP's claim for costs was excessive.

[8] Blaney McMurtry LLP was entirely successful on a motion that had considerable tactical, strategic, and substantive importance in this very complex matter. Although the law relating to

¹ S.O. 1992, c. 6.

² *Mattina v. Virtus Capital Management Inc.*, 2023 ONSC 6272.

³ *Henderson v. Henderson* 2015 ONSC 4884; *Burgess (Litigation Guardian Of) v. Canadian National Railway* [2005] O.J. No. 4650.

privilege and its waiver either expressly or by implication is well established, it arose in a novel, peculiar, and complex way in this case. Blaney McMurtry LLP's ability to defend itself would have been adversely affected if it failed to secure the declaration that it sought. Conversely, it was important for the Defendants for strategic and tactical reasons to oppose the motion.

[9] The motion was important to both sides and its novelty is not of the type that would justify resort to s. 31 of the *Class Proceedings Act, 1992* nor would make it appropriate to defer a costs decision until the Certification motion.

[10] A critical controlling principle for the awarding of costs is that the sum awarded reflect the fair and reasonable expectations of the unsuccessful litigant.⁴ The overriding principle in awarding costs is reasonableness.⁵ The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case.⁶

[11] In my opinion, a reasonable costs award in the circumstances of the immediate case is the one proposed by Blaney McMurtry LLP plus \$1,000 on account of the expense of making costs submissions. I, therefore, award it \$16,000, all inclusive. Each group of defendants is severally liable for \$8,000.

[12] Order accordingly.

Perell, J.

Released: December 14, 2023

⁴ *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 at para. 24 (C.A.); *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004] O.J. No. 2102 at para. 97 (C.A.); *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 at para. 4 (Ont. C.A.); *McGee v. London Life Insurance Co.*, [2008] O.J. No. 5312 at paras. 5-8 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 at paras. 23-25 (S.C.J.); *Lee v. General Motors Co. of Canada*, [2004] O.J. No. 2245 (S.C.J.).

⁵ *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 at para. 52 (C.A.).

⁶ *Das v. George Weston Limited*, 2017 ONSC 5583 at para. 65, var'd 2018 ONCA 1053.

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DEVELOPMENT FUND TRUST, 2558627
ONTARIO INC., COMPUTERSHARE TRUST
COMPANY OF CANADA, BLANEY MCMURTRY
LLP, GEORGE STREET (BROOKLIN) LIMITED
PARTNERSHIP, 2541672 ONTARIO INC.,
MICARI CONSULTING INC., ROSEWATER
BALDWIN STREET HOLDINGS LIMITED,
RICHARD FAVA, ROSEWATER CAPITAL
GROUP LIMITED, ROSEWATER
DEVELOPMENTS LIMITED, STOCKWORTH
DEVELOPMENTS INC., ROSEWATER
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MARIO BOTTERO, MARCO LORENTI,
MARCELO PEREZ, TREVOR RABIE,
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